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No. 82-239

In the

Supreme Court of the United States

October Term, 1982

JOSEPH ARTUSO and JOHN ARTUSO,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

1. Whether petitioners' rights were violated when they were subpoenaed before a grand jury and questioned without benefit of counsel, as a result of which each was indicted for criminal contempt in the first degree, a felony under New York Law? (Fifth, Sixth and Fourteenth Amendments, U.S. Const.)

2. Whether petitioners, both of whom are simple bakers by profession, and with no legal background, were properly permitted to plead guilty to the felony of criminal contempt, first degree, without benefit of the aid of counsel, despite their protestations that they were "innocent" and did not know why they had been subpoenaed to a grand jury in the first place? (Fifth, Sixth and Fourteenth Amendments, U.S. Const.)

3. Whether petitioners' rights to the aid of counsel were violated when the Trial Court, prior to accepting their pleas of guilty to a felony, namely criminal contempt first degree, allowed only two days time to petitioners to obtain a lawyer, during which interval no attorney could be obtained? (Fifth, Sixth, and Fourteenth Amendments, U.S. Const.)

4. Whether the procedures followed by the State of New York, and the Trial Court in particular, were constitutional, in that the petitioners, without the aid of counsel and, in essence, protesting their innocence, were permitted to plead guilty to criminal contempt first degree, a felony, and then sentenced to the maximum term permitted by law? (Fifth, Sixth, Eighth and Fourteenth Amendments, U.S. Const.)

PARTIES.

The parties in the Supreme Court of the State of New York, Appellate Division, Second Department, were the petitioners herein and the People of the State of New York.

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In the

SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

- X

JOSEPH ARTUSO and JOHN ARTUSO,

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vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

- X

PETITION FOR A WRIT OF CERTIORARI.

OPINION BELOW.

A copy of the memorandum decision of the New York Supreme Court, Appellate Division, Second Department, as well as its order modifying but otherwise affirm-

ing the judgments of conviction, are annexed as an appendix herein.

The order of Associate Judge Bernard S. Meyer, of the New York Court of Appeals, denying leave to appeal on the 14th day of June, 1982, is annexed hereto and made a part hereof.

JURISDICTION.

A) The judgment of conviction was rendered on the 11th day of December, 1980, convicting each of the petitioners of criminal contempt in the first degree, upon their respective pleas of guilty, *sans* counsel, before Couzens, J., sentence being pronounced by Marasco, J. Each petitioner was sentenced to the maximum term of four years, but the Supreme Court, Appellate Division, Second Department, modified that sentence by reducing it to one year.

It was alleged in the indictment that the petitioners contumaciously and willfully refused to testify before a grand jury.

B) The order of affirmance of the Supreme Court, Appellate Division, Second Department, was rendered the 19th day of April, 1982, a copy of which is annexed hereto as part of the appendix. An order of the Court of Appeals, State of New York, per Associate Judge Bernard S. Meyer, denying leave to appeal to the Court of Appeals, is dated the 14th day of June, 1982, and is also annexed hereto as part of the appendix.

C) Jurisdiction to review the judgment in question by certiorari is conferred under 28 U.S.C. Sections 1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED HEREIN.

The Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution are involved herein, as well as Section 215.51 of the New York Penal Law.

The Fifth Amendment, so far as pertinent, provides:

> "No person shall be deprived of his life, liberty or property without due process of law."

The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

The Eighth Amendment provides:

> "* * * nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides:

> "No state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 215.51 of the Penal Law provides:

> "A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully * * *, after having been sworn as a witness before a grand jury, he refuses to answer any legal and proper interrogatory."

STATEMENT OF THE CASE.

The petitioners herein, both young men, one of whom has no prior criminal

record at all, and the other with a very insignificant prior infraction, were simple bakers by profession, operating a small-store type of bakery.

They were subpoenaed before a grand jury in Westchester County and were told that they were not targets of the investigation.

Both appeared before the grand jury without counsel and were totally frightened, confused, and upset because they had been subpoenaed in the first place.

The prosecutor informed them that the grand jury wanted to know whether they knew someone by the name of Bradford Wedra, to which Joseph Artuso answered in the affirmative, informing the District Attorney that this was his wife's cousion. The prosecutor then asked about a place called "Fudgie's," and Joseph Artuso responded:

> "A. Well, I am going to be honest with you, I don't know how you want me to answer these questions, but I wasn't familiar why I was sent for, I have no idea. As soon as I walked in this room --this matter seems like it doesn't concern me. I have no idea why I am here. It does not concern me in the least." (GJ 17, 18).*

He was asked later, on page 20, whether he had spoken to an attorney before coming to the grand jury, and answered:

> "A. Definitely I did not, no idea why I was sent for. I figure-- I assume it could have been a mistake or, you know, it seemed kind of funny that I was sent for. I have no idea--"

---

* Numerals in parentheses preceded by the letters "G.J." refer to pages of grand jury minutes. Where no prefix appears the numerals refer to pages of the official court reporter's minutes of the trial proceedings.

John Artuso also stated that he came to the grand jury pursuant to a subpoena and that he had no idea why he was there. When questioned as to whether he had a lawyer, John Artuso answered:

> "A. But, I never-- I don't have a lawyer, I don't know what is going on here.
>
> "Q. You don't need a lawyer? A. I have never been in court before, you know" (GJ 24).

Later on, pathetically, John Artuso was asked (GJ 25):

> "Q. You haven't done anything, correct? A. I work, that's all I have done.
>
> "Q. You haven't committed any crime? A. No, no."

The petitioners, neither of whom had any experience with grand juries or felonies, were obviously in such a

position that extreme caution should have been exercised in handling them.

The prosecutor obtained an indictment for criminal contempt in the first degree against each of them, and when they appeared before the County Court of Westchester County, they both again appeared without counsel.

While the Court alloted them two days time to get counsel, there was really no determination, in any meaningful sense, as to whether or not they could afford to get counsel, or, for that matter, whether they really understood the impact of what was happening.

They both decided to plead guilty, without any plea bargain whatsoever, to the indictment itself, and were sentenced to the maximum term of imprisonment permissible under the law.

Shortly before their sentence, however, their family obtained a lawyer for them and an effort was made to have them withdraw their pleas of guilty and go to trial.

No possible prejudice could flow to either the prosecution or the Court by permitting a withdrawal of the pleas of guilty, but the Court would not permit it.

It should also be noted that no effort to take these two petitioners before a judge was made by the prosecutor during the grand jury proceedings to explain their rights to make sure that they were not being mistreated or confused by the prosecution or the grand jury. The statute requires that the witness answer a "legal and proper interrogatory" which would require aid of counsel to determine. They had no counsel.

POINT I.

THE PETITIONER'S RIGHTS TO A FAIR PROCEEDING UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE DENIED BY THE ARBITRARY AND ABRUPT TREATMENT WHICH THEY RECEIVED BOTH BEFORE THE GRAND JURY AND IN THE COUNTY COURT OF WESTCHESTER COUNTY, SINCE THEY WERE CALLED BEFORE A GRAND JURY AS WITNESSES, WITHOUT COUNSEL, AND THEY WERE PERMITTED TO PLEAD GUILTY IN THE COUNTY COURT TO THE FELONY OF CRIMINAL CONTEMPT FIRST DEGREE, FOR WHICH THEY WERE INDICTED, ALSO WITHOUT BENEFIT OF COUNSEL.

(A)

Their rights were further violated under the Sixth Amendment and Fourteenth Amendment when the County Court refused permission to withdraw their pleas of guilty prior to sentence and proceed to trial with an attorney who had been retained by their family following their pleas of guilty.

One of the most fundamental rights of any individual who is called before a grand jury or who is arraigned before a criminal court is the right to counsel.

In 1892 the Supreme Court held, in *Counselman v. Hitchcock*, 142 U. S. 547,

12 S. Ct. 195, 198, that the Fifth Amendment privilege against self-incrimination applied to grand jury proceedings, and held that a grand jury investigation comes within the broad language of the term "criminal prosecution," as used in the Fifth Amendment.

In *Kirby v. Illinois*, 406 U. S. 682, 688-91, 92 S. Ct. 1877, 1881-83, the Supreme Court adhered to this definition of "criminal prosecution" in holding that the Sixth Amendment right to counsel attached to the initiation of any adversary judicial proceeding.

In New York it is clear that a witness before a grand jury is entitled to advice of counsel and, indeed, has the right to be taken before a judge to acquaint him with these rights (*People v. Ianello*, 21 N. Y. 2d 418, 288 N. Y. S. 2d 462, cert. den. 393 U. S. 827;

Matter of Additional January 1979 Grand Jury v. Doe, 50 N. Y. 2d 14, 427 N. Y. S. 2d 950-955-6).

Moreover it is clear that an attempt to ensnare a grand jury witness is a violation of his Constitutional rights to due process and equal protection of the law (*People v. Tyler*, 46 N. Y. 2d 251, 259).

Thus, many commentators have argued extensively that the right to counsel is perhaps more important in a grand jury proceeding than almost anywhere else because:

(1) a grand jury witness is faced with more legally complex questions of self-incrimination than is an accused during police interrogation;

(2) he must avoid incriminating himself;

(3) if the witness is granted immunity, he must be cognizant of its scope; and

(4) the witness may need counsel as to other testimonial privileges, and also as to Constitutionally protected areas of inquiry. (Steele, "Right to Counsel at the Grand Jury State of Criminal Proceedings," 36 Mo. L. Rev. 193, 203 [1971]).

Thus, in federal jurisdictions and a number of state jurisdictions, a witness must be given the right to consult with an attorney outside the grand jury room (*United States v. Corallo*, 413 F. 2d 1306 [2 Cir. 1969], cert. den. 396 U. S. 958; *People v. Ianello*, *supra*; *In Re White*, 340 Mich. 140, 65 N. W. 2d 296 [1954], rev'd on other grounds, 349 U. S. 133).

In the case at bar, the petitioners both protested throughout the proceedings before the grand jury that they had no idea why they had been called and they did not understand why they needed a lawyer.

Since no meaningful allocution was held to determine whether the petitioners could afford counsel, we maintain that under such cases as *Gideon v. Wainright*, 372 U. S. 335, which overruled *Betts v. Brady*, 316 U. S. 455, it was held "that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (*Gideon v. Wainwright*, 372 U. S. at 344). This establishes the importance of counsel in all respects.

Since the absence of counsel when a defendant pleads guilty goes to the fairness of the proceeding itself and undermines the presumption of reliability that attaches to a judgment of a court, *Gideon* has been held fully retroactive so we may judge from that how important that right is deemed.

Moreover, the Sixth Amendment has been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented to the fullest measure by a person of his choice. (*Glasser v. United States*, 315 U. S. 60; *United States v. Hayman*, 342 U. S. 205; and, *Ellis v. United States*, 356 U. S. 674).

In *United States v. Ash*, 413 U. S. 300, this Court, while redefining and modifying its "critical stage" analysis by which it determines when the assist-

ance of counsel is required for an indicted defendant prior to trial, nevertheless held that the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the prosecutor."

Moreover, *Ash* recognized that assistance of counsel would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the criminal prosecution itself." (*Id.* at 309-313).

In *Herring v. New York*, 422 U. S. 853, 857, this Court held that there can be no restrictions upon the function of

counsel in defending a criminal prosecution in accord with the traditions of the adversary fact findings process that has been constitutionalized in the Sixth and Fourteenth Amendments.

In the case at bar, neither in the grand jury nor in the trial court, were these unsophisticated young men, plying an occupation as simple bakers, ever accorded the right to counsel. The pretense that the Trial Court made in giving them about two days to get counsel was meaningless because not only did the Court fail to make adequate inquiries as to whether they could afford counsel, but had made no inquiry as to whether or not they could find counsel under these circumstances. After all, most people are totally unsophisticated in criminal matters and to find a competent criminal lawyer could hardly be accom-

plished by such individuals within a two-day period.

Under the circumstances, we maintain that counsel was effectively denied to these individuals.

To compound the problem, however, was the fact that after the pleas of guilty were taken, and before sentencing when their families retained a lawyer for them, the Trial Court refused to permit them to vacate their pleas of guilty and to go to trial, in spite of the fact that there could not possibly be any prejudice to the prosecution or the courts.

The denial of counsel can never be deemed harmless error (*Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824, where this Court stated "* * * there are some rights so basic to a fair trial [right to counsel] that their infraction

can never be treated as harmless error * * *" [*id.*, 386 U. S. at 23, 87 S. Ct. at 827-28]).

The treatment accorded petitioners directly conflicted and undermined their Fifth, Sixth and Fourteenth Amendment rights.

POINT II.

THE IMPOSITION OF A FOUR-YEAR SENTENCE BY THE COUNTY COURT UPON THE PETITIONERS' UNCOUNSELED PLEAS OF GUILTY TO THE INDICTMENT ITSELF, IN VIEW OF THE FACT THAT THEY CONCEDEDLY WERE NOT TARGETS OF THE INVESTIGATION AND WERE SOUGHT MERELY AS WITNESSES, COUPLED WITH THE FACT THAT THE CASE DID NOT DEPEND UPON THEIR TESTIMONY IN THE GRAND JURY, CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AMENDMENT.

While we recognize that the Eighth Amendment does not ordinarily reach the question of mere incarceration following conviction, we believe that there comes a point when a sentence is so dispropor-

tionate to the crime involved that the Eighth Amendment may be violated.

This Court has indicated that a length or other conditions of sentence may constitute a violation of the Eighth Amendment (*Hutto v. Finney*, 437 U. S. 678, 98 S. Ct. 2565; *Powell v. Texas*, 392 U. S. 514, 88 S. Ct. 2145; and, *Robinson v. California*, 370 U. S. 660, 82 S. Ct. 1417).

It must be borne in mind that in the case at bar the defendants did not even know, in any real sense, what was going on, and maintained their total ignorance of why they had even been summoned to the grand jury. Further inquiry should have been made before maximum sentences were imposed.

The fact that an appellate court reduced the sentence does not eliminate the fact that they were still compelled

to be incarcerated for a full year under circumstances where, we maintain, no conviction at all should have occurred because they were totally unprotected in court since they never had counsel.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioners.

CERTIFICATION.

I, IRVING ANOLIK, a member of the bar of this Court, certify that on the 10th day of August, 1982, five (5) copies of the within Petition for Certiorari were served upon the attorney for respondent, namely the District Attorney of Westchester County, by serving true copies thereof upon the District Attorney by first class mail, at 111 Grove Street, White Plains, New York 10601.

IRVING ANOLIK.

DECISION OF NASTASI, J.

COUNTY COURT : WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

JOSEPH ARTUSO, :

Defendant. :

Indictment No. 80-00898-01. :

NASTASI, J.

By Indictment No. 80-00898-01, the defendant was charged with the crime of Criminal Contempt in the First Degree. Specifically, it was alleged that on September 2, 1980, the defendant appeared before a duly constituted Westchester County Grand Jury that had been conducting an investigation into a homicide in the Town of Greenburgh on May 11, 1980. The defendant was duly sworn under oath, informed of the nature and scope of the

Grand Jury investigation, and further advised that he was receiving immunity from prosecution for any transaction about which he was questioned. The Grand Jury sought to determine the extent, if any, of defendant's knowledge of the actions of the victim, Giampierro Molle, and one Bradford Wedra, and the circumstancs surrounding their presence at a restaurant in Greenburgh, New York, during the weeks before and the day of May 11, 1980. It is further alleged that the defendant contumaciously and unlawfully refused to answer legal and proper interrogatories concerning his knowledge of the activities of Giampierro Molle, Bradford Wedra and any observations the defendant may have made at said restaurant and that such refusal obstructed the legitimate Grand Jury proceedings.

The defendant appeared in the Westchester County Court, the Honorable John C. Couzens, presiding, for arraignment on the accusatory instrument. At that time the defendant was apprised of the charges against him and advised of his right to be represented by counsel. An adjournment was granted until October 8, 1980, to enable him to secure an attorney. On that date, counsel, retained by the defendant's family, did in fact appear on his behalf, but was relieved at the defendant's insistence. The defendant then stated his intention to enter a plea of guilty. Despite the urgings of both the Court and the prosecutor to reconsider, the defendant persisted in his decision to proceed *pro se* and plead guilty as charged. After a voir dire of the defendant, the Court accepted the plea.

The defendant now moves to withdraw his previously entered plea of guilty. The application is denied.

A defendant may not knowingly, voluntarily and without coercion enter a plea of guilty and subsequently repudiate it at will (see *People v. Frederick*, 45 N. Y. 2d 520). Thus, a plea of guilty may not be withdrawn unless there is some claim of innocence (see *People v. Dixon*, 29 N. Y. 2d 55) or an assertion that the plea was induced by fraud, coercion or mistake (see *People v. Lowrance*, 41 N. Y. 2d 303). This Court has carefully examined the record of the proceedings heretofore conducted in the case at bar, both before the Honorable John C. Couzens and the Westchester County Grand Jury, as well as the moving, answering and replying papers and can find no basis upon which the plea may be withdrawn.

Indeed, the defendant's contentions that he did not fully understand the proceedings and that he was somehow coerced into entering his plea are completely refuted by the record. Indeed, the record clearly established that the facts are to the contrary. An extensive *voir dire* of the defendant was conducted by the District Attorney and the Court prior to the acceptance of the plea, wherein he acknowledged his guilt, indicated that he had an opportunity to consult with an attorney and his family and understood the consequences of both his decision to forego representation and his plea. The defendant unequivocably stated that the plea was of his own free will and that he had not been threatened or coerced in any way, and that he was in good physical and mental condition. An examination of the record thus reveals

that the defendant made a knowing and voluntary waiver of his right to be represented by an attorney and entered a plea of guilty with the clear understanding of what he was doing, including the waiver of his constitutional right to an adjudication of guilt at trial. The admission that he understood the charges and that he had committed the acts recited in the indictment established a factual basis to support the plea. The trial court and the People took great pains to ascertain that the waiver of his right to counsel as well as the plea was knowingly, intelligently and voluntarily made with a full understanding of the consequences thereof (see *People v. Nixon*, 21 N. Y. 2d 338, 345; compare *People v. Gina M. M.*, 40 N. Y. 2d 595, 597).

Concomitantly, no claim of innocence was ever advanced during the course of these proceedings. Nor can it be said that the claim, now advanced, is one to be given any crednece by this Court. To the contrary, this Court has examined the minutes of the proceedings before the Grand Jury upon which the instant charge is predicated and finds that such claim is devoid of any factual basis (see *People v. Dixon, supra,* at 57).

It simply is not enough that the defendant may now have changed his mind. The Court sought to scrupulously protect the rights of the defendant at all stages. He nevertheless persisted in his course of conduct and entered a plea of guilty. This Court will not now allow the defendant to manipulate the future proceedings of this Court to his own end as he attemped to frustrate and obstruct those

of the Westchester County Grand Jury. In short, this Court is satisfied that at the time the plea was entered the defendant was well aware of his rights and made a knowing and intelligent waiver thereof and that, in fact, he is guilty of the crime to which he pled (see *People v. Frederick, supra; People v. Selikoff,* 35 N. Y. 2d 227).

Judicial recognition of the laudable purposes served by plea negotiations is legion and need not be documented here (see *e.g., Borden Kircher v. Hayes,* 434 U. S. 357; *Blacklodge v. Allison,* 431 U. S. 63; *Santobello v. New York,* 404 U. S. 257; *Brady v. United States, supra; People v. Frederick, supra*). The dispositive factor in this case is the need for *finality* which *must* be accorded dispositions by guilty pleas in order to secure these acknowledged benefits.

"Only reigorous adherence by the courts to a policy of affording guilty pleas a great measure of finality will immunize plea negotiations from indiscriminate potshots" (*People v. Frederick, supra,* at 525). Accordingly, the defendant's motion to withdraw his plea of guilty is denied (CPL §220.60[3]).

The defendant also seeks an order of the Court dismissing the instant indictment as a matter of law or in the interests of justice. These applications are denied as well.

This Court can find no nexus between the defendant's allegations and any ground upon which it may dismiss the instant indictment (CPL §210.20[1]). The Court has examined the record of the proceedings before the Grand Jury annexed as an exhibit to the defendant's moving papers and can not conclude on the basis

thereof that the integrity of the Grand Jury proceeding was impaired in any way much less in a manner in which prejudice to the defendant may result therefrom (CPL §§ 190.05 *et seq.*, 210.20[1][c], 210.35[5]). In short, this Court must and will presume that the Grand Jury took and acted upon the evidence before it in conformity with its oath and obligation. At the same time, and the defendant's characterization of these proceedings notwithstanding, the Court can find no impropriety on the part of the Assistant District Attorney with respect to this defendant or any of the proceedings nor any substantial misstatements of fact with respect to the defendant's rights before or duties with respect to said Grand Jury (compare *Matter of Additional January 1979 Grand Jury v. Doe*, 50 N. Y. 2d 14; *People v. Ianello*, 21 N. Y. 2d 418).

Nor may a motion to dismiss in the interests of justice succeed (see CPL §§ 210.20[1][i], 210.40). A dismissal of an indictment in the furtherance of justice is required as a matter of judicial discretion and only by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant would constitute or result in injustice (CPL §210.40[1]; see *People v. Belge*, 41 N. Y. 2d 60; see *People Kwok Ming Chan*, 45 A. D. 2d 613). The factors which are to be examined and considered, individually and collectively, are enumerated in Section 210.40 and need not be reiterated here (see also *People v. Clayton*, 41 A. D. 2d 204). This Court has so examined and considered those factors which are applicable to the case at bar and the facts and arguments set

forth by the defendant and finds that there exists no compelling factor, consideration or circumstance which clearly demonstrates to the Court that conviction or prosecution would constitute or result in injustice. Rather, the public interests here must be as fully protected as the individual interests of the defendant for justice and mercy. The seriousness and circumstances of the instant offense lead the Court to conclude that a dismissal of the instant indictment would have a deleterious impart not only upon the confidence of the public in the criminal justice system but upon the safety and welfare of the community as well. The Court is not otherwise persuaded by any facts set forth by the defendant. Accordingly, the motion to dismiss in the furtherance of justice is also denied (CPL §210.45[5]).

The aforesaid constitutes the Court's decision and order on the motion.

DATED: White Plains, New York
December 9, 1980

s/ALDO A. NASTASI
J. C. C.

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ORDER OF APPELLATE DIVISION, SECOND DEPARTMENT, DATED APRIL 19, 1982.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 19, 1982.

HON. LEON D. LAZER, Judtice Presiding,

HON. GUY J. MANGANO,
HON. RICHARD A. BROWN,
HON. JAMES F. NIEHOFF, Associate Justices.

The People, etc.,	
Respondent,	
v.	
Joseph Artuso,	
Appellant.	
The People, etc.,	
Respondent,	
v.	
John Artuso,	
Appellant.	

In the above entitled actions, the above named Joseph Artuso, defendant in the first above entitled action, and the above named John Artuso, defendant in the second above entitled action, having appealed to this court from two judgments (one as to each defendant) of the County Court, Westchester County, both rendered December 11, 1980, convicting each of them of criminal contempt in the first degree, upon their guilty pleas, and sentencing each of them to indeterminate terms of imprisonment with a maximum of four years; and the said appeals having been argued by Irving Anolik, Esq., of counsel for appellants and argued by Lois A. Cullen, Esq., of counsel for respondent, and due deliberation having been had thereon; and upon this Court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgments are hereby modified, as a matter of discretion in the interest of justice, by reducing the sentences imposed to definite sentences of imprisonment of one year, and, as so modified, said judgments appealed from are hereby unanimously affirmed, and the cases are hereby remitted to the County Court, Westchester County, for further proceedings pursuant to CPL 460.50 (subd. 5).

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

DECISION OF APPELLATE DIVISION, SECOND DEPARTMENT, DATED MARCH 8, 1982.

LEON D. LAZER, J.P.

GUY J. MANGANO
RICHARD A. BROWN
JAMES F. NIEHOFF, JJ.

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6E A - March 8, 1982

The People, etc.,

Respondent,

v.

Joseph Artuso,

Appellant.

(Ind. No. 898-80)

The People, etc.,

Respondent,

v.

John Artuso,

Appellant.

(Ind. No. 897-80)

Roger Milch, White Plains, N. Y. (Irving Anolik of counsel), for appellants.

Carl A. Vergari, District Attorney, White Plains, N. Y. (Lois A. Cullen of counsel), for respondent.

Appeals by defendants from two judgments (one as to each of them) of the County Court, Westchester County (Marasco, J., at sentencing; Couzens, J., at the pleas), both rendered December 11, 1980, convicting each of them of criminal contempt in the first degree, upon their guilty pleas, and sentencing each of them to indeterminate terms of imprisonment with a maximum of four years.

Judgments modified, as a matter of discretion in the interest of justice, by reducing the sentences imposed to definite sentences of imprisonment of one year. As so modified, judgments affirmed, and cases remitted to the County Court, Westchester County, for further

proceedings pursuant to CPL 460.50 (subd. 5).

Although we agree with the County Court that the failure of defendants to co-operate with a Grand Jury's homicide investigation was reprehensible and should be punished by sentences of incarceration, we are convinced that the indeterminate prison sentences imposed were excessive. In view of the minimal criminal history of Joseph Artuso and John Artuso's lack of criminal history, and their social, family, and employment backgrounds, a definite sentence of imprisonment of one year seems proper. Under the facts and circumstances of this case, such a period of incarceration is appropriate for achieving the penal goals of punishment, deterrence, rehabilitation and community protection.

We have considered defendants' other contentions on appeal and find them to be without merit.

LAZER, J.P., MANGANO, BROWN and NIEHOFF, JJ., concur.

April 19, 1982

CERTIFICATE DENYING LEAVE TO APPEAL.

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER,

Associate Judge.

No. 694

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JOHN ARTUSO and JOSEPH ARTUSO,

Defendant-Appellant.

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record

and proceedings herein,° there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 14, 1982

BERNARD S. MEYER
Associate Judge

° Description of Order: Order of the Appellate Division, Second Department, entered April 19, 1982, modifying two judgments (one as to each defendant) of the County Court, Westchester County, both rendered December 11, 1980, by reducing the sentences imposed to definite sentences of imprisonment of one year, and, as so modified, affirming said judgments.

Office - Supreme Court, U.S.
FILED
SEP 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-239

JOSEPH ARTUSO and JOHN ARTUSO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 22 of the Rules of this Court, the respondent submits this brief in opposition to the captioned petition for a Writ of Certiorari.

Preliminary Overview

The petitioners were convicted, upon their pleas of guilty entered in the County Court, Westchester County, on October 8, 1980 (Joseph Artuso) and October 10, 1980 (John Artuso), of the crime of Criminal Contempt in

the First Degree. By a decision and order dated December 9, 1980, the Honorable Aldo A. Nastasi, County Court Judge, denied a joint motion to withdraw said guilty pleas. On December 11, 1980, the petitioners were sentenced to an indeterminate term of imprisonment with a maximum of four years. On April 19, 1982, the Supreme Court of the State of New York, Appellate Division, Second Department, modified the judgment of conviction by reducing the sentences imposed to definite sentences of imprisonment of one year, and, as modified, unanimously affirmed the judgments and remitted the matter to the County Court, Westchester County, for further proceedings. Thereafter, leave to appeal to the New York State Court of Appeals was denied. (Bernard S. Meyer, Associate Judge). In accordance with the aforementioned decision, the petitioners were resentenced on July 19, 1982, in the County Court, Westchester County, to definite sentences of imprisonment of one year.*

Facts

On September 2, 1980, the petitioners appeared, under subpoena, before a Westchester County Grand Jury investigating a homicide which had occurred on May 11, 1980 outside of a Hartsdale discotheque known as "Fudgies Too". Specifically, Assistant District Attorney Bruce Bendish sought to elicit information from the Artuso brothers concerning the actions of Bradford Wedra, the target of the investigation, with regard to the victim of the homicide, Giampierro Molle. Joseph Artuso was called first. From the outset, the witness was uncooperative. Upon a refusal to answer questions posed by the prosecutor, the witness was informed that he was not a target of the investigation, that he had been given immunity for his testimony, and that the only crimes he could

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* An application for a stay of judgment was denied by this Court on July 20, 1982 (Marshall, J.).

be charged with on the basis of his testimony were perjury (if he testified falsely) and contempt (if he refused to answer). The witness nonetheless persisted in his refusal, at which point the prosecutor asked if he desired to step outside and speak to an attorney. The witness indicated that he did not care to confer with an attorney, and was excused.

Thereafter, John Artuso was called to the stand and similarly refused to answer questions, despite the prosecutor's explication of the principle of immunity and the crime of contempt. The witness was then excused, and the brothers remained in the waiting room for approximately two hours, while the Grand Jury proceeding contined. Assistant District Attorney Bendish had instructed them to do whatever they felt necessary and call an attorney or whomever else they desired in the interim. The prosecutor was informed at that time by both Artusos that neither wanted to confer with counsel.

Approximately two hours later, the petitioners were recalled (separately) as witnesses. Although Assistant District Attorney Bendish reiterated that the witness was obliged to answer and would receive immunity for his testimony, explained the consequences of refusal (to wit: a possible indictment for Criminal Contempt which, upon conviction, could result in a four year State's prison term), and repeated the purpose of the Grand Jury's investigation, the petitioners remained steadfast in their refusal to answer *any and all* questions.

That same day, the petitioners were charged, by separate indictments, with the crime of Criminal Contempt in the First Degree. Arraignment was scheduled for October 6, 1980, at which time both defendants, appearing *sans* counsel, were apprised of the charges against them and advised of their right to be represented by an attorney.*

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* The Honorable John C. Couzens, the presiding judge, unequivocally informed the defendants that the assistanse of counsel was necessary.

An adjournment to October 8, 1980 was granted for the procurement of counsel*, and the bail was set at $5,000. Paul Victor, Esq., had previously contacted the District Attorney's Office, stating that he was acting on the defendants' behalf at the request of the Artuso family, and was given a copy of the indictment. However, after Joseph and John Artuso stated that they did not wish Mr. Victor to represent them, he was relieved.

John Farrauto, Esq., appeared on behalf of both defendants on October 8, 1980, again at the request of the Artuso family and offered to provide *pro bono service*. However, this attorney was also relieved at the insistance of the defendants. On this date, both defendants indicated their intention to plead guilty *sans* an attorney, although the Court indicated there were attorneys available in Court that would represent them. After a conversation with Assistant District Attorney Bendish, in which the prosecutor strongly advised the defendant to consider having the assistance of counsel in this matter, John Artuso agreed to an adjournment of his case until October 10, 1980. Joseph Artuso, however, remained adamant in his decision to forego counsel and plead guilty. After a representation by Mr. Farrauto that "the defendant advised me he does not wish to have an attorney, even *pro bono*," Joseph Artuso was extensively *voir dired* and entered a plea of guilty as charged.**

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* At no time was there any indication by either defendant that the length of the adjournment was inadequate.

** The Court again informed the defendant on the record that he was entitled to be represented by an attorney and that the proceedings could be adjourned for the purpose of securing the services of an attorney. The defendant recognized his rights and explicitly stated he had had an opportunity to speak to an attorney and declared his intent to plead guilty without an attorney, mindful of the fact that the crime was an E felony punishable by a maximum of four years state's prison term.

On October 10, 1980, John Artuso appeared in Court and stated that he did not wish to avail himself of the services of an attorney, and wished to plead guilty. The defendant indicated that he was aware he was waiving his right to a trial and admitted to the facts set forth in the indictment.

Prior to entering their respective guilty pleas, each of the defendants spoke to at least three attorneys, declining to accept representation and never indicating that they were dissatisfied by the selection and wished further time in which to obtain a different attorney.*

POINT ONE

The petitioners knowingly and voluntarily chose to proceed without counsel; their constitutional rights were in no way abbrogated.

At no stage of the proceedings herein did the petitioners request the assistance of counsel. Indeed, they persistently refused to even confer with an attorney. Now, petitioners in essence contend that their right to counsel was violated because counsel was not forced upon them. The suggestion is absurd.

The petitioners were called before the Grand Jury as mere witnesses, each under a grant of immunity. Thus, no fifth amendment privilege against self incrimination is involved. They were not the "target" of the Grand

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* At the October 6, 1980 proceedings, Joseph Artuso specifically asked for an adjournment to October 8, 1980 for the purpose of obtaining an attorney. On October 8, 1980, he emphatically stated that he did not want an attorney, nor did he wish additional time to reconsider his intent to plead guilty without counsel. Similarly, John Artuso (after being granted a second adjournment on October 8, 1980 to October 10, 1980 for the purpose of securing counsel) explicitly expressed his desire to proceed *pro se*.

Jury's probe. There was no attempt to "ensnare" the witnesses: the prosecutor's sole purpose was to elicit information relevant to a homicide investigation. Nonetheless, the petitioners refused to answer any and all questions; they did not challenge the pertinency of particular questions. (Compare, *Matter of Additional January 1979 Grand Jury* v. *Doe*, 50 N.Y. 2d 14). Nor did they ever request to confer with an attorney (see, *People* v. *Ianello*, 21 N.Y. 2d 418, 425, *cert. denied*, 393 U.S. 827); but, rather, refused the opportunity to do so.

Thereafter, the petitioners, steadfast in their rejection of counsel, knowingly and voluntarily entered guilty pleas. It is beyond cavil that an accused has a constitutional right to proceed *pro se* when he voluntarily and intelligently elects to do so. (*Faretta* v. *California*, 422 U.S. 806; *People* v. *McIntyre*, 36 N.Y. 2d 10; *People* v. *Medina*, 44 N.Y. 2d 199). When the petitioners so determinedly and unequivocally insisted on rejecting counsel and proceeding *pro se*, the court had no recourse but to permit them to do so; "that it might have been inadvisable for (them) to act as (their) own lawyer did not destroy the right to make a calculated decision to do so." (*People* v. *Medina*, *supra* at 210).

Nor does the denial of the motion to vacate the previously entered guilty pleas, which rests squarely within the sound discretion of the trial court (McKinney's New York Crim. Pro. Law § 220.60(3)), implicate or violate any constitutional safeguards.

POINT TWO

A one year sentence of imprisonment, imposed pursuant to a conviction of the Crime of Criminal Contempt, does not constitute cruel and unusual punishment in contravention of the Eighth Amendment.

The petitioners' contumacious conduct in refusing to cooperate with a Grand Jury investigating a homicide constituted the serious crime of Criminal Contempt in the First Degree*; for which they are presently serving one year prison terms. This Court has consistently held that the Eighth Amendment applies only where the punishment is "grossly disproportionate to the severity of the crime." (*Weems* v. *United States*, 217 U.S. 349; *Coker* v. *Georgia*, 433 U.S. 584, 592). The power to strike down punishments as excessive is to be exercised with great circumspection and only in extraordinary cases. (See, *Rhodes* v. *Chapman*, 452 U.S. 337; *Furman* v. *Georgia*, 408 U.S. 238, 414 (dissenting opinion, Powell, J.), rehearing denied 409 U.S. 902). Challenges to the duration of the sentence have oft been rejected. (See, *Pervear* v. *Massachusetts*, 5 Wall 475; *Howard* v. *Fleming*, 191 U.S. 126; *Badders* v. *United States*, 240 U.S. 391). The case at bar presents no issue of cruel and unusual punishment.**

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* Said offense is classified as a Class E Felony (McKinney's New York Penal Law, § 215.51, punishable by a maximum of four years imprisonment (McKinney's New York Penal Law, § 70.00(2)(e)).

** This Court has rejected such a challenge to a civil contempt conviction pursuant to which the offender was to be imprisoned indefinately, until he complied with the court order he had flouted. (*Uphaus* v. *Wyman*, 360 U.S. 72; rehearing denied, 361 U.S. 856).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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